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No. 95-1325

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

AMERICAN PIONEER LIFE INSURANCE COMPANY and JERRY CURTIS,

Petitioners,

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vs.

FREDDY J. WILLIAMSON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Petitioners American Pioneer Life Insurance Company and Jerry Curtis waived their right to review the underlying verdict on the ground that it violates the Due Process Clause of the Fourteenth Amendment because the argument was not pressed or passed upon by the courts below.

2. Whether the punitive damage award in this case violates the Due Process Clause of the Fourteenth Amendment.

3. Whether the issue advanced by the Petitioners and the facts of the underlying case are sufficiently similar to *BMW v. Gore* so as to warrant this Court's review of the case.

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OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The opinion of the Supreme Court of Alabama is reported at 1995 WL 372051. The opinion of the Supreme Court of Alabama overruling petitioners' application for rehearing is reported at 1995 WL 694530. Both opinions are reprinted in the Petition at Appendix A. The order of the Circuit Court of Jefferson County denying petitioners' post-trial motions is not reported but is reproduced in the petition at Appendix A.

Respondent submits that this Court does not have jurisdiction to review the verdict in question by writ of certiorari because the question presented by the petitioners does not concern conflicting decisions of courts of appeal or state courts nor does it bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States. In addition, there is no title, right, privilege, or immunity specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States. 28 U.S.C.S. § 1257.

STATEMENT OF THE CASE

Respondent, Freddy J. Williamson (hereinafter "Williamson"), is an independent insurance agent from Trussville, Alabama. R. 679; 674. As an independent insurance agent, Mr. Williamson received renewal commissions[1] from various insurance companies with whom he had contracted and sold insurance. R. 681. Mr. Williamson worked as an agent for

1. A renewal commission is money paid to an agent for a set number of years under the terms of the contract if the policyholder renews the insurance policy after the initial coverage period. R. 406-407; 914.

petitioner American Pioneer Life Insurance Company (hereinafter "American Pioneer") from 1984 to 1989 under a written contract which promised him renewal commissions. R. 684; 815. He sold various products offered by American Pioneer including life insurance, disability insurance, cancer insurance, annuities and other type policies. R. 815. Mr. Williamson also sold health insurance policies for American Pioneer but a premium increase of 50% and a dramatic decline in claims handling effectively eliminated most health insurance sales by late 1987. R. 705; 813.

On April 13, 1989, American Pioneer terminated Mr. Williamson as an agent because of his declining sales. R. 708. Although he was no longer an active American Pioneer agent, Mr. Williamson's contract entitled him to continue receiving vested[2] renewal commissions. R. 397. He also continued to service American Pioneer policies sold by him and to receive information from the company regarding those policies. R. 689.

Just twelve (12) days later, Mr. Williamson was informed by American Pioneer that it was invoking the forfeiture clause in his contract. R. 898-899; 914; *see also*, Pl. Exh. 9. In its letter of April 25, 1989, American Pioneer accused Mr. Williamson of improperly inducing a policyholder[3] to replace an American Pioneer policy with a policy from another company. R. 914; 718. When American Pioneer invokes a forfeiture clause, the agent's

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2. A vested renewal commission is "one that the agent is entitled to receive." R. 560. These commissions are contractually earned and are due to the agent.

3. Mike Carroll was the policyholder. Uncontradicted trial testimony revealed he initiated contact with Mr. Williamson and requested a product unavailable from American Pioneer. He further testified that American Pioneer did not contact him before invoking the forfeiture clause. R. 281; 380.

renewal commissions are withheld and he is placed "completely in the dark" concerning insurance information about his clients. R. 525-526. By invoking the forfeiture clause in Mr. Williamson's contract, American Pioneer took his money and "put it in the pocket . . . of American Pioneer." R. 409. This lawsuit arose as a result of American Pioneer's actions.

Taking away Mr. Williamson's vested renewal commissions deprived him of income from American Pioneer for a ten (10) year period. R. 738. And by deliberately withholding policyholder service information from Mr. Williamson, American Pioneer effectively eliminated his ability to maintain his business or work on its growth. R. 725-730. Commissions, according to American Pioneer, are analogous to an annuity. R. 398. Using American Pioneer's own annuity projections, Mr. Williamson proved the value of commissions withheld totaled at least $112,500 if invested over ten years. R. 738.

The sole and undisputed reason given by American Pioneer for forfeiting Mr. Williamson's vested renewal commissions was because he allegedly "induce[d] or attempt[ed] to induce" Mr. Carroll to replace his policy.[4] R. 400; 410; 914. "Replacement" in the insurance industry means the substitution of a policy for one written by a different company. R. 587. There is nothing improper or illegal in Alabama for an agent to replace a policy if it is done in accordance with requirements of the Alabama Insurance Department. R. 562-563. The replacement of Mr. Carroll's policy met all such requirements. R. 585.

Before being terminated by American Pioneer on April 13, 1989, Mr. Williamson had been involved in three (3) policy

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4. Invocation of the forfeiture clause was the only way American Pioneer could stop Mr. Williamson from getting his vested renewal commissions under the contract. R. 400; Pl. Exh. 2.

replacements, all of which were reported to the company.[5] R. 697, 700, 702. Mr. Williamson was never criticized, warned, or otherwise told that he was violating any rule or policy at American Pioneer. R. 694; 701; 708. To the contrary, Mr. Williamson was considered "a good agent" having never been the subject of a complaint. R. 422; 527. Less than two weeks after termination as an agent, however, American Pioneer revoked Mr. Williamson's vested renewal commissions due to the replacement of a policy. Pl. Exh. 9; R. 897-898.

The transaction used by American Pioneer to invoke forfeiture began when Mr. Carroll decided, after consulting periodicals and conversion information, that he wanted a policy different from the one issued by American Pioneer. R. 281. Mr. Carroll and his wife desired a level premium policy with an industry rating of A+.[6] R. 281. The decision to change policies was made by Mr. Carroll before he ever called Mr. Williamson. R. 282-283.

Since American Pioneer had no product fitting Mr. Carroll's criteria, Mr. Williamson presented several policies from other companies for consideration. R. 306. Mr. Carroll's testimony was adamant and uncontradicted that Mr. Williamson did nothing to induce or attempt to induce the replacement of his policy. R. 282-283; 306.

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5. Mr. Carroll's replacement also was reported to American Pioneer. It took no steps to try and keep the business even though it had a department whose job was to try and conserve policies in force. R. 407; 463; 914.

6. American Pioneer was not an A+ rated company. It held a B+ rating. R. 710-714. Therefore, it was impossible to replace the existing policy with any American Pioneer product. Mr. Carroll had changed jobs and wanted to reduce the amount of his insurance because of benefits in his new job. R. 712.

With regard to the transaction involving Mr. Carroll, American Pioneer vice president Al Parent testified Mr. Williamson should have sold an American Pioneer policy to Mr. Carroll no matter what he wanted. R. 477. Of course, Mr. Carroll testified that if Mr. Williamson had not fulfilled his request for insurance, he would have gone "somewhere else" to get a new policy. R. 306.

Karen Kline worked as an assistant vice president of American Pioneer in April of 1989. She made the decision to terminate Mr. Williamson's commissions and to withhold policyholder service information. R. 889-890. The April 25, 1989, letter invoking the contractual forfeiture clause was prepared before Ms. Kline ever saw Mr. Williamson's file or otherwise considered his situation. R. 890. Ms. Kline took no action to contact either Mr. Carroll or Mr. Williamson before invoking the forfeiture clause. R. 913-914. Nor did Ms. Kline make more than a cursory attempt to investigate whether Mr. Williamson induced or attempted to induce the replacement of an American Pioneer policy. R. 914. According to Ms. Kline, Mr. Williamson's mere involvement with a replacement was sufficient to invoke the clause. R. 914.

Ms. Kline sent Mr. Williamson a form letter terminating him under the forfeiture clause just as she had done with 12 other agents simply because she received a replacement notice. R. 924; 917. Despite Ms. Kline's action, Mr. Parent testified that an agent's involvement in an insurance policy replacement is not wrong *per se*. R. 433; 506. The plaintiff's expert witness, Ms. Jan Dowdle,[7] explained that insurance policy replacement notices

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7. Ms. Dowdle is a licensed attorney who worked in the insurance industry in charge of licensing and agent compensation for Protective Life Insurance Company in all 50 states. R. 556. Her professional designations include; Fellow of Life Office Management Institute, Associate of Life & Health Claims, and Fellow of the Life Insurance Management Institute. R. 550-553.

are received quite frequently and that an agent's involvement in an insurance replacement does not constitute inducement of a policyholder to change policies. R. 562; 591. According to industry standards, an insurance agent should not have his or her livelihood taken away without an investigation. R. 568. In fact, Ms. Dowdle testified that she knew of "no reputable company" that would cut off an agent's renewal commissions and policyholder information solely because the agent was involved in providing a replacement policy for his or her client. R. 591.

The undisputed evidence proves American Pioneer had no basis to conclude Mr. Williamson had "induced" or "attempted to induce" the replacement of an insurance policy. American Pioneer had a policy of invoking an agent's forfeiture clause, without any investigation whatsoever, where the slightest colorable excuse was presented. American Pioneer's policy of equating "inducement" with a mere replacement was never communicated to any of the company's agents. R. 416-417. The trial court and jury recognized that American Pioneer had an unwritten, undisclosed and secretive policy of withholding agent's commissions after they were no longer producing enough sales for the company and using the receipt of a Replacement Notice to justify its actions. R. 415; 853.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS WAIVED THE RIGHT TO REVIEW THE UNDERLYING VERDICT ON THE GROUND THAT IT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE CLAIM WAS NOT PRESSED OR PASSED UPON IN THE STATE COURT PROCEEDINGS BELOW.

The petition filed by American Pioneer Life Insurance Company and Jerry Curtis (hereinafter "Curtis") is limited to the sole issue of whether the $2 million punitive damage award in this case is so excessive as to violate the Due Process Clause of the Fourteenth Amendment. Petition, p. i. Petitioners admit that the procedural requirements for the imposition of punitive damages were addressed by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Petition, p. 9. As such, the petition requests this Court to review the underlying verdict in order to determine whether the punitive damages award in this case violates a substantive limit imposed by the Due Process Clause. Petition, pp. 9-10.

A. The Due Process Issue Was Not Addressed By The Alabama Supreme Court.

The petition should be denied because the issue of whether the punitive damages award violates due process was never raised or argued during the state court appeals process nor was it passed upon by the Alabama Supreme Court. This Court has held for over a century that it will not consider a constitutional challenge to a state court decision where the challenge was not properly raised and preserved at the state court level. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Dewey v. De Moines*, 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis*, 22 L. Ed. (1875).

On appeal to the Alabama Supreme Court, petitioners advanced several arguments. The Alabama Supreme Court pretermitted discussion of issues relating to the sufficiency of the evidence as well as the jury charge of reckless misrepresentation, stating that those issues were "without merit." *American Pioneer Life Ins. Co. v. Williamson*, 1995 WL 372051, p. 2 (Ala. 1995); Petition, p. 4a, n.1. As phrased by the Alabama Supreme Court, the remaining issues involved the petitioners' contention that "the trial court had erred in submitting the fraud count to the jury" and, in the alternative, "that the judge should have ordered a remittitur of the $3 million punitive damages award." *Id.*; Petition, p. 4a. The petitioners' brief on appeal phrased the issue pertaining to the size of the punitive damages award as follows:

> Whether the court erred in failing to reduce the $3 million punitive award, which represents approximately 40% of the net worth of the defendant, American Pioneer, and where there was no showing of profitability or other improper motive, since the evidence presented by defendant showed that APL's application of the forfeiture provision was in accordance with industry practice.

Petitioners' Brief on Appeal to the Alabama Supreme Court, p. vii.

The only issue on appeal to the Alabama Supreme Court, as phrased both by the petitioners and by the Alabama Supreme Court, failed to address or advance due process arguments. Rather, petitioners asserted that the trial judge erred in applying the procedures mandated by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and

Green Oil Co. v. Hornsby, 539 So. 2d 218 (Ala. 1989) and approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991). In deciding whether the trial court properly conducted post-trial review of the punitive damages award, the Alabama Supreme Court conducted an independent analysis of the factors approved by this Court in *Pacific Mutual Life Ins. Co. v. Haslip, supra,* and concluded that the punitive damages verdict should be remitted by $1 million. Petitioners did not advance a constitutional due process argument to the Alabama Supreme Court and for that reason, the Alabama Supreme Court never addressed that issue. Because the issue of whether the punitive damages verdict violates the Due Process Clause of the Fourteenth Amendment was never pressed or passed upon by the highest court of the State of Alabama, the issue has been waived and should not be considered on appeal to this Court.

This Court's long-standing rule of refusing to decide constitutional issues which were not raised and passed upon by a state's highest court was applied under similar facts in *Banker's Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988). In *Crenshaw*, a Mississippi jury awarded the plaintiff $20,000 in compensatory damages and $1.6 million in punitive damages for the defendant's bad-faith refusal to pay an insurance claim. *Id.* at 71. The Mississippi Supreme Court affirmed the verdict. The initial appeal did not raise a federal constitutional challenge to the size of the punitive damages award. *Id.* In its petition for rehearing however, the defendant asserted that the award was "clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles." *Id.* This Court held that such a statement was not sufficient to preserve the due process issues on appeal.

> The vague appeal to constitutional principles does not preserve appellant's Contract

> Clause or due process claims. A party may not preserve a constitutional challenge by generally invoking the constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon.

Id. at 77 (*citing cf. Taylor v. Illinois*, 484 U.S. 400, 407, n. 9 (1988) for the proposition that "a generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights . . .").

This Court further noted that the defendant's reference to the excessiveness of the punitive damages verdict was better suited to a constitutional challenge to the size of the award based on the Excessive Fines Clause of the Eighth Amendment. *Id.* at 77. However, the Court concluded that "[a]lthough the petition for rehearing alleges that the fine is excessive, it does not indicate that the fine is excessive as a constitutional matter, be it state or federal." *Id.* at 78.

Concomitantly, while petitioners American Pioneer and Curtis asserted in their state court appeal that the verdict was excessive and should be remitted, they never provided more than a passing reference to due process and *never mentioned* the Fourteenth Amendment. Rather, they argued that the trial judge erred in applying the facts and evidence to the relevant legal standards approved by *Pacific Mutual Insurance Co. v. Haslip*, *supra.* In short, petitioners' appeal was limited to alleged plain error on the part of the trial judge.

This Court's rule prohibiting consideration of issues not decided by the highest courts of the states arises from Title 28 U.S.C. § 1257. The Court held early on that there would be no

jurisdiction unless a federal question was both raised and decided in the state court below. Unless both requirements appeared on the record, appellate jurisdiction would fail. *Crowell v. Randell*, 9 L. Ed. 458 (1836). Thereafter, this Court developed the rule that a federal claim would not be considered unless it had been either raised or squarely considered and resolved in the state court with the highest jurisdiction. *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 435-436 (1940). In *State Farm Mut. Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945), the Court reasoned that because a state supreme court did not pass on the federal question, this Court could not do so.

Similarly, in *Illinois v. Gates*, 462 U.S. 213, 215 (1983), this Court requested the parties to address an additional question other than those which were briefed and argued to the Court. However, the Court did not reach the issue. *Id.* at 222-223. The Court's ruling was grounded on the fact that there was never any 'real contest' during the appeal process below, and as such, the issue was not pressed or passed upon in the lower courts. *Id. See also Browning-Ferris Industries v. Kelco Disposal Co., Inc.*, 492 U.S. 257 (1989).

In *Browning-Ferris*, the petitioner's claim that due process acts as a check on undue jury discretion in awarding punitive damages was not considered because the argument was not raised earlier on appeal. *Id.* at 276-277. The Court reasoned as follows:

> In the absence of a developed record on the issues relevant to this due process inquiry, we shall not stretch the "clear intendment" doctrine to include this case, as we do not think the due process question is "only an enlargement" of the Eighth Amendment

> inquiry. Although the due process analysis of an award of punitive damages may track closely the Eighth Amendment analysis suggested by petitioners, we shall not assume that to be the case and shall not attempt to decide the question in the absence of a record on the due process point developed in the district court and the Court of Appeals.

Id. at 277, n. 23.

This Court has further held that at the minimum, "there should be no doubt from the record that a claim under a *federal* statute or the *federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981). *See also Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 549-550 (1987).

Because the petitioners in the present case failed to properly preserve the due process issues, those issues were never passed upon by the Alabama Supreme Court, thus creating a void in the record. Hence, there is nothing for this Court to review. Because the due process issue was not decided by the Alabama Supreme Court, it should not be passed upon by this Court due to the deficiencies in the record below and the jurisdictional rule prohibiting such review.

B. Petitioners Failed To Comply With Supreme Court Rule 14.1(g)(i).

Rule 14.1(g)(i) requires that the Petition for Writ of Certiorari contain cites pertaining to:

> When the federal questions sought to be

> reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court's charge and exception thereto, assignment of error), so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari. . . .

United States Supreme Court Rule 14.1(g)(i).

The petitioners have failed to comply with this rule. In an attempt at compliance, petitioners cite a portion of the dissent to the application for rehearing to the Alabama Supreme Court as the sole reference to their belated due process argument. Petition p. 7. There is no reference to the record below, no reference to the trial court's rulings and no reference to the Alabama Supreme Court opinion which was issued before the petitioners filed their application for rehearing to the Alabama Supreme Court. The reason for petitioners' failure to cite the relevant portions of the record and opinion below is due to the fact that petitioners' due process argument was not pressed or passed upon by the Alabama Supreme Court. Rather, the Alabama Supreme Court reviewed the action of the trial judge and the application of the law to the facts and evidence.

In the dissent to the decision overruling the petitioners' application on rehearing, Justice Maddox of the Alabama Supreme Court points out that the maximum punitive damages award he would permit would be $250,000. 1995 WL 694530,

p. 2 (Ala. 1995); Petition, p. 19a. It was Justice Maddox's opinion that petitioners had not engaged in "a pattern and practice of wrongful conduct that would justify more than that amount." *Id.* Justice Maddox's dissent is a memorialization of an Alabama statute which limited punitive damages to $250,000 in cases not involving a pattern and practice of wrongful activity. Ala. Code § 6-11-21 (1975). That statute was declared to be in violation of the Constitution of the State of Alabama in *Henderson v. Alabama Power, Co.*, 627 So. 2d 878 (Ala. 1993). Justice Maddox conducts no due process analysis in his dissent. Although he cites *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, __ U.S. __, 115 S. Ct. 932 (1995); Petition, pp. 18a-19a, at no time was the issue addressed in the opinion of the Alabama Supreme Court. *See American Pioneer Life Ins., Co. & Jerry Curtis v. Freddy J. Williamson*, 1995 WL 372051; Petition, pp. 1a-14a. Because the decision was affirmed without opinion on rehearing, the due process issue was not pressed or passed upon by the highest court of the State of Alabama. Petition, pp. 15a-19a.

II.

THE PUNITIVE DAMAGE AWARD IN THIS CASE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Petitioners assert that the Due Process Clause of the Fourteenth Amendment imposes a substantive limit on the size of punitive damages awards by a jury. A plurality of this Court has held that "grossly excessive" punitive damages may violate due process. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. __, 113 S. Ct. 2711, 2718-2719 (1993). However, the plurality in *TXO* also concluded that when an "award was reviewed and upheld by the trial judge" and then unanimously affirmed on appeal, there was a "strong presumption of validity." *Id.* at 2720.

In the present case, the trial judge applied the standards set forth by *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989) and *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). *American Pioneer Life Ins. Co., v. Williamson*, 1995 WL 372051, p. 2 (Ala. 1995); Petition, pp. 11a-12a. The factors articulated in those decisions were reviewed and approved by this Court in *Pacific Mutual Insurance Co. v. Haslip, supra.* Based on those factors, the trial judge concluded that the jury's award of punitive damages was proper.

As an additional safeguard on the trial court's review of the punitive damage verdict, the Alabama Supreme Court conducted an independent review of the same factors. Applying the facts of the case to those factors, the Alabama Supreme Court concluded that the verdict should be reduced by $1 million.

The factors were properly applied by the Alabama Supreme Court and comport with due process in every respect. The Alabama Supreme Court considered the following factors in reviewing the jury's punitive damages award:

> '(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all

> the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.'

American Pioneer Life Ins. Co., v. Williamson, 1995 WL 372051, p. 2 (Ala. 1995); Petition, pp. 11a-12a.

In light of the above factors, the punitive damages award in this case, reduced to $2 million by the Alabama Supreme Court is entirely justified. The State of Alabama is entitled to take into account the need for deterrence in assessing the amount of punitive damages awarded for wrongful conduct. *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2723 n. 29 (1993) (plurality opinion); *Lake Shore & Michigan Southern Ry. Co. v. Prentice*, 147 U.S. 101, 107 (1893).

In addition, it is well settled that the profit or expected profit that a defendant stands to gain from the conduct in question is also an appropriate factor to consider in assessing punitive damages. *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1, 22 (1991). In the present case, the evidence presented to the jury indicated that *by petitioners' own projections* and using the interest rate petitioners guaranteed when respondent's vested renewal commissions were terminated, respondent would have received $112,500 over a ten year period if the commissions were invested. R. 737-739, 822. At trial, American Pioneer Vice President, Parent, testified that an insurance agent's vested renewal commissions are comparable to an annuity in that the money is earned by and owed to the agent. R. 398-399. When American Pioneer invoked the forfeiture provisions and terminated Mr. Williamson's vested renewal commissions, *the money was placed on petitioner's books* where it remains. R. 399.

Mr. Parent further testified that at the time of the forfeiture, American Pioneer owed Mr. Williamson money and that money was "put in the pocket of American Pioneer." R. 409. By revoking Mr. Williamson's vested commissions, the petitioners gained a windfall. This fact was taken into consideration by the jury, the trial judge and the Alabama Supreme Court in assessing the punitive damages applicable to this case.

Another factor considered by the Alabama Supreme Court in reviewing the punitive damages verdict was the wealth of the defendants. It is "well settled law" that the size of a punitive damages verdict may be reasonable when the defendant's wealth is taken into consideration. *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2722 n. 28 (1993) (plurality opinion). When this factor was considered, the Alabama Supreme Court reduced the verdict by $1 million. *American Pioneer Life Ins. Co., v. Williamson*, 1995 WL 372051, p. 2 (Ala. 1995); Petition, pp. 13a-14a. The remitted verdict constituted 4% of petitioner American Pioneer's worth.[8]

When reviewing the jury verdict in this case, the Alabama Supreme Court also considered the reprehensibility of the defendant's conduct and the defendant's awareness of that conduct. *American Pioneer Life Ins. Co., v. Williamson*, 1995 WL 372051, p. 2 (Ala. 1995); Petition, pp. 11a-12a. The evidence presented at trial showed the egregious nature of the petitioners' conduct. Before the petitioners' terminated Mr. Williamson's vested renewal commissions, he received no

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8. American Pioneer argues to this Court the $2 million verdict affirmed below is excessive in contrast to its surplus cash reserves of $7 million. Petition, p. 7. However, in presenting its argument for a reduction of the verdict to the Supreme Court of Alabama, American Pioneer utilized a more illustrative measurement of its wealth in excess of $47 million. American Pioneer's Brief in Support of App. for Rehearing, p. 16.

communications or notice that replacing a policy at the insured's request was prohibited. R. 708. Once the petitioners terminated the commissions, they stopped forwarding Mr. Williamson all information on his clients. R. 689, 719. Without this information, an agent such as Mr. Williamson cannot service his client's policies and preserve his commissions. R. 720.

Mr. Williamson's business was based on his reputation. R. 688. Once the petitioners terminated his commissions and withheld important client information, Mr. Williamson had no means to preserve his business and his reputation with his clients. R. 719-720; 724. Mr. Williamson suffered great harm to his relationship with his clients due to petitioners' refusal to provide information which would enable him to service his clients. That evidence was before the Alabama Supreme Court at the time it reviewed the jury's award of punitive damages. The Alabama Supreme Court correctly considered the reprehensibility of the petitioners' conduct when it reviewed the verdict. Petition, pp. 11a-12a. Based on that evidence, the verdict was justified and in accordance with the factors approved by this Court.

Because the verdict has been reviewed by the trial judge and affirmed on appeal, with a substantial reduction in the punitive damages award based on the factors articulated by this Court in *Pacific Mutual Ins. Co. v. Haslip, supra,* the verdict is not excessive and comports with the requirements of the Due Process Clause of the Fourteenth Amendment.

III.

THE FACTS OF THIS CASE ARE NOT SUFFICIENTLY SIMILAR TO *BMW V. GORE* TO JUSTIFY THIS COURT'S CONSIDERATION OF THE ISSUE PRESENTED BY PETITIONERS.

The petition asserts that the claim made by the petitioners in this case is the same as the claim made in the *BMW* case. Petition, p. 8; *BMW of North America, Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, __ U.S. __, 115 S. Ct. 932 (1995). Petitioners ask this Court to hold the Petition pending its decision in *BMW*. It is true that the petitioners in *BMW* argued that substantive due process should impose limits on the size of punitive damages verdicts. However, the facts of the present case are not similar to those in *BMW* and this Court should deny the Petition.

A. The Petitioners In *BMW* Argued That BMW Was Punished For Extraterritorial Conduct.

One of the main arguments in the *BMW* case is that the jury and courts improperly based the punitive damages verdict on evidence that BMW sold approximately 1,000 partially damaged cars and represented those cars as "new" over a ten year period in the United States. As such, a large component of the punitive damages verdict in *BMW* was based on retrospective conduct. In the present case, the verdict was not based on retrospective conduct. Instead, one of the factors considered by the trial judge and the Alabama Supreme Court related to prospective matters. In other words, the trial judge and Alabama Supreme Court considered the amount of punitive damages necessary to deter similar conduct by the petitioners in the future.[9] *American*

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9. Petitioners attempt to argue that Mr. Williamson's closing statement urged the jury to punish them for past conduct relating to the 3,000 other agents (Cont'd)

Pioneer Life Ins. Co., v. Williamson, 1995 WL 372051, p. 4 (Ala. 1995); Petition, pp. 11a-12a. The respondent never asked the jury or courts below to consider past conduct in other jurisdictions. Irrespective of whether consideration of past conduct is improper in assessing punitive damages, the Alabama Supreme Court correctly concluded that an assessment of punitive damages in the amount of $2 million was necessary in order to deter similar conduct in the future.

B. Petitioners' Conduct Was Much More Reprehensible Than In *BMW*.

In *BMW*, the defendants repainted cars which suffered minor damage. The cars were fully and properly repaired and were in essence, "new" cars. The plaintiff, Dr. Gore, suffered only a potential loss relating to the resale value of the car.[10]

(Cont'd)
associated with American Pioneer. Petition, p. 5. Such was not the case. Mr. Williamson simply made reference to Petitioners' 3,000 agents and requested the jury to assess an amount necessary to make the "Al Parents and Jerry Curtises and the Karen Klines of this world to understand what they have done. . . . And every time somebody at American Pioneer picks up their pencil and gets ready to cross some agent off and take his vested renewals away, somebody else will say, wait a minute." R. 1122-1123. The argument was entirely related to the deterrence factor accepted by this Court in assessing punitive damages. Nevertheless, petitioners' assertion that the argument was improper has no bearing at this stage of the proceeding. Petitioners never objected to the argument nor did they raise the issue on their initial appeal to the Alabama Supreme Court.

10. The *BMW* case is factually and legally distinguishable from the present case because it involved a compensatory damage award of $4,000 as a result of nondisclosed damage to an automobile. In this case, the jury awarded $250,000 in compensatory damages as a result of the wrongful termination of Mr. Williamson's vested renewal commissions and accompanying emotional distress.

In the present case, Mr. Williamson was stripped of his vested renewal commissions. The evidence showed he could have received $112,500 over a ten year period if the commissions were invested. R. 737-739, 822. Petitioners *admitted* that the commissions were taken away from Mr. Williamson and "put in the pocket of American Pioneer." R. 409. Mr. Williamson never received the vested commissions which the jury determined belonged to him. Petitioners further admitted that the letter to Mr. Williamson revoking his commissions was prepared *before his file was reviewed*. R. 890.

In addition, the evidence showed that Mr. Williamson suffered great emotional distress due to the termination of his vested renewal commissions. R. 745-746. The petitioners' refusal to provide Mr. Williamson with necessary information with which to service his clients proved to be detrimental to his longstanding business reputation and his ability to service his clients. R. 745-746. These actions were taken by the petitioners with little or no information as to Mr. Williamson's reasons for replacing the policy. R. 890. The actions of the petitioners were taken in spite of the fact that Mr. Williamson was merely performing his *duty* to his client by providing the best product given his client's needs.

Because the conduct of the petitioners in the present case is much more egregious and reprehensible than that involved in the *BMW* case, and because the *compensatory* damages award was 62 times higher than in *BMW*, the Court should not use *BMW* as a benchmark in determining whether the award of punitive damages in this case was excessive and should not "hold" the petition as requested by petitioners.

CONCLUSION

For the foregoing reasons, Respondent Freddy Williamson respectfully requests the Court to deny the Petition For Writ of Certiorari.

Respectfully submitted,

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